

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RICHARD A. KEETER and U.S. POSTAL SERVICE,
POST OFFICE, New Brunswick, NJ

*Docket No. 00-2655; Submitted on the Record;
Issued June 27, 2001*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly determined that appellant received a \$5,397.22 overpayment of compensation; (2) whether the Office properly determined that appellant was at fault in creating the overpayment of compensation, thereby precluding waiver of recovery of the overpayment; and (3) whether the Office properly required repayment of the overpayment by deducting \$100.00 from his continuing compensation payments every 4 weeks.

In May 1994 the Office accepted that appellant, then a 48-year-old intelligence aid and clerk, sustained an employment-related myelopathy. The Office paid appropriate compensation for periods of partial disability.¹ By decision dated June 2, 2000, the Office determined that appellant received a \$5,397.22 overpayment of compensation; that he was at fault in creating the overpayment of compensation, thereby precluding waiver of recovery of the overpayment; and that the overpayment should be recovered by deducting \$100.00 from appellant's compensation payments every 4 weeks.

The Board finds that appellant received a \$5,397.22 overpayment of compensation.

In the present case, appellant received compensation for the period March 19, 1996 to November 6, 1999 at the augment compensation rate of 75 percent. Because appellant did not have a dependent during this period, he was only entitled to receive compensation at the statutory rate of 66 2/3 percent.² The record contains evidence which shows that appellant received

¹ Appellant worked in limited-duty positions for the employing establishment.

² A partially disabled employee without a dependent disabled receives compensation equal to 66 2/3 percent of the difference between his monthly pay and his monthly wage-earning capacity after the beginning of the partial disability. 5 U.S.C. § 8106(a). A partially disabled employee with at least one dependent is entitled to have his compensation augmented at the rate of 8 1/3 percent of the difference between his monthly pay and his monthly wage-earning capacity. 5 U.S.C. § 8110(b)(2).

\$48,972.29 in compensation for the period March 19, 1996 to November 6, 1999, when he was only entitled to receive \$43,575.07. Therefore, the Office properly determined that appellant received a \$5,397.22 overpayment.

The Board further finds that whether the Office properly determined that appellant was at fault in creating the overpayment of compensation and that, therefore, the overpayment was not subject to waiver.

Section 8129(a) of the Federal Employees' Compensation Act³ provides that where an overpayment of compensation has been made "because of an error of fact or law," adjustment shall be made by decreasing later payments to which an individual is entitled.⁴ The only exception to this requirement is a situation which meets the tests set forth as follows in section 8129(b): "Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience."⁵ No waiver of payment is possible if the claimant is not "without fault" in helping to create the overpayment.

In determining whether an individual is not "without fault" or alternatively, "with fault," section 10.433(a) of Title 20 of the Code of Federal Regulations provides in relevant part:

"An individual is with fault in the creation of an overpayment who--

- (1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or
- (2) Failed to provide information which he or she knew or should have known to be material; or
- (3) Accepted a payment which he or she knew or should have known to be incorrect...."⁶

In this case, the Office applied the third standard in determining that appellant was at fault in creating the overpayment.

³ 5 U.S.C. §§ 8101-8193.

⁴ 5 U.S.C. § 8129(a).

⁵ 5 U.S.C. § 8129(b).

⁶ 20 C.F.R. § 10.433(a).

Section 10.433(c) of the Office's regulations provides:

"Whether or not [the Office] determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid."⁷

The Board finds that for the period March 19, 1996 to November 6, 1999, appellant accepted payments which he knew or should have known to be incorrect. By CA-1047 letters dated February 20 and July 17, 1996, the Office advised appellant that he would not be entitled to receive compensation at the augmented rate if he no longer had a dependent.⁸ On April 24, 1996 appellant advised the Office that his daughter had stopped being a dependent on March 18, 1996 as she had turned 18 on that date.⁹ Appellant contended that he had improperly received compensation at a reduced rate while his daughter was still a dependent. Appellant's reporting of these facts shows that he understood that he would not be entitled to receive compensation at the augmented rate after March 19, 1996. The record contains other evidence that appellant understood the amount of compensation he was entitled to receive. Beginning in early 1996, appellant engaged in detailed communications with the Office regarding the proper pay rate for his compensation benefits.

Appellant indicated that he was not aware of the amount of the compensation disbursements he received during the period March 19, 1996 to November 6, 1999 because the disbursements were electronically deposited into his account. However, given the extended period of time that appellant received such compensation, it would appear unlikely that he would not be cognizant of the amount of the compensation disbursements. Even though the Office may have been negligent in continuing to issue appellant compensation at the augmented rate after it was informed that he no longer was entitled to compensation at the augmented rate, this does not excuse appellant's acceptance of such payment which he knew or should have been expected to know should have been returned to the Office.¹⁰

The Board further finds that the Office properly required repayment of the overpayment by deducting \$100.00 from appellant's compensation payments every 4 weeks.

⁷ 20 C.F.R. § 10.433(c).

⁸ The Office stated, "Your compensation benefits are based on 66 2/3 percent (no dependents) or 75 percent (one or more dependents) of the difference between your pay rate as determined for compensation purposes and your ability to earn wages in your new position...."

⁹ Appellant completed a CA-1032 letter, which asked him to report whether he still had a dependent. In an accompanying communication, appellant also suggested that his daughter would remain a dependent as she was a full-time student. Appellant did not provide documentation to support this assertion. See 5 U.S.C. § 5110(a).

¹⁰ *Robert W. O'Brien*, 36 ECAB 541, 547 (1985).

Section 10.441(a) of Title 20 of the Code of Federal Regulations provides in pertinent part:

“When an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to [the Office] the amount of the overpayment as soon as the error is discovered or his or her attention is called to the same. If no refund is made, [the Office] shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual and any other relevant factors, so as to minimize any hardship.”¹¹

The record supports that, in requiring repayment of the overpayment by deducting \$100.00 from appellant’s compensation payments every 4 weeks, the Office took into consideration the financial information submitted by appellant as well as the factors set forth in section 10.441 and found that this method of recovery would minimize any resulting hardship on appellant. Therefore, the Office properly required repayment of the overpayment by deducting from appellant’s compensation payments every four weeks.

The June 2, 2000 decision of the Office of Workers’ Compensation Programs is hereby affirmed.

Dated, Washington, DC
June 27, 2001

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

¹¹ 20 C.F.R. § 10.441(a); *see Donald R. Schueler*, 39 ECAB 1056, 1062 (1988).